

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,420

RICHARD H. WARD, Appellant

v.

UNITED STATES OF AMERICA, Appellee

761

Appeal From Judgment of the United States District Court
For the District of Columbia

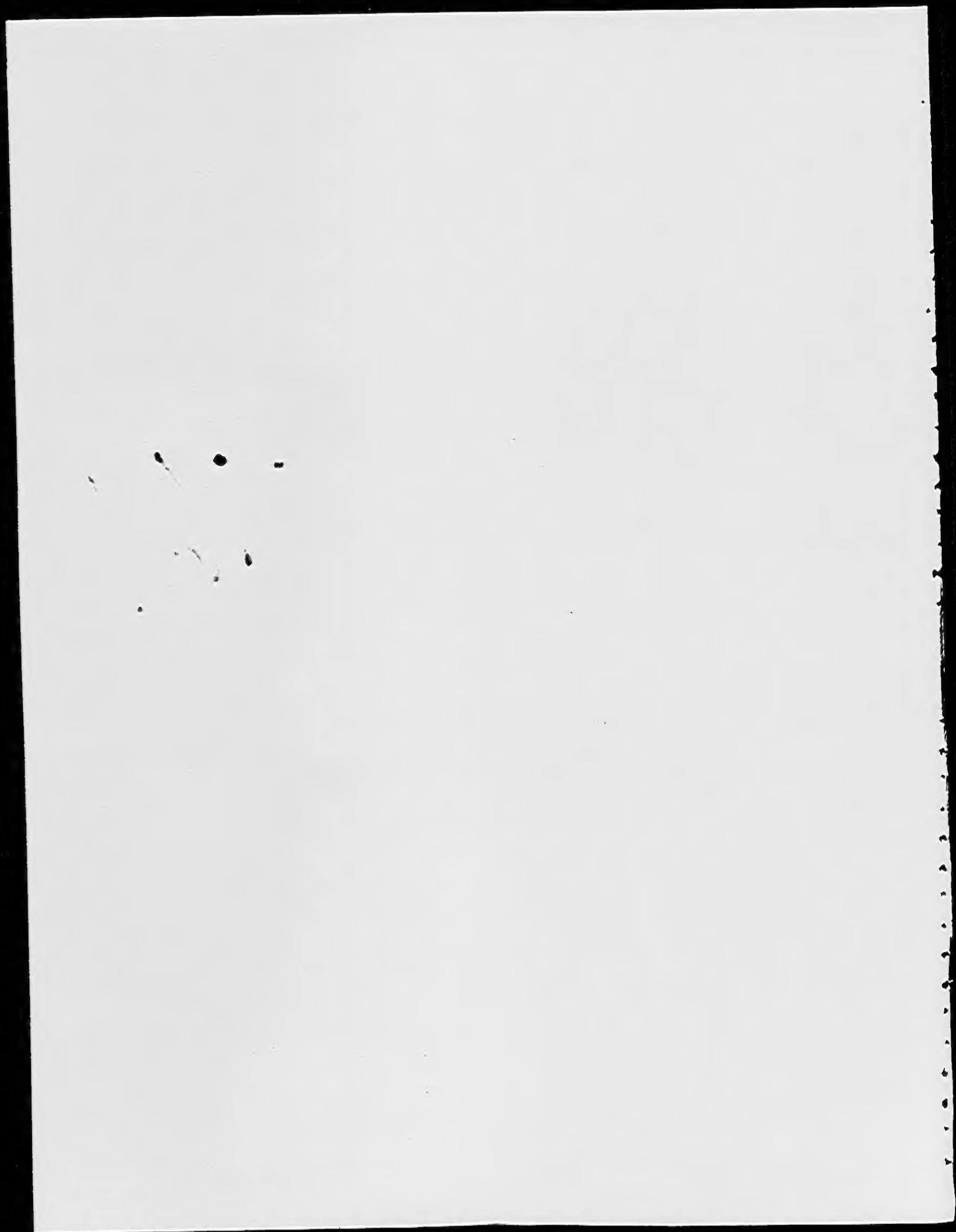
United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 28 1964

Nathan J. Paulson
CLERK

H. Edward Chozick
908 Warner Building
Washington 4, D.C.

Counsel For Appellant
Appointed by This Court



STATEMENT OF QUESTIONS PRESENTED

1. Whether defendant was denied a speedy trial in contravention of his rights under the Sixth Amendment of the United States Constitution.



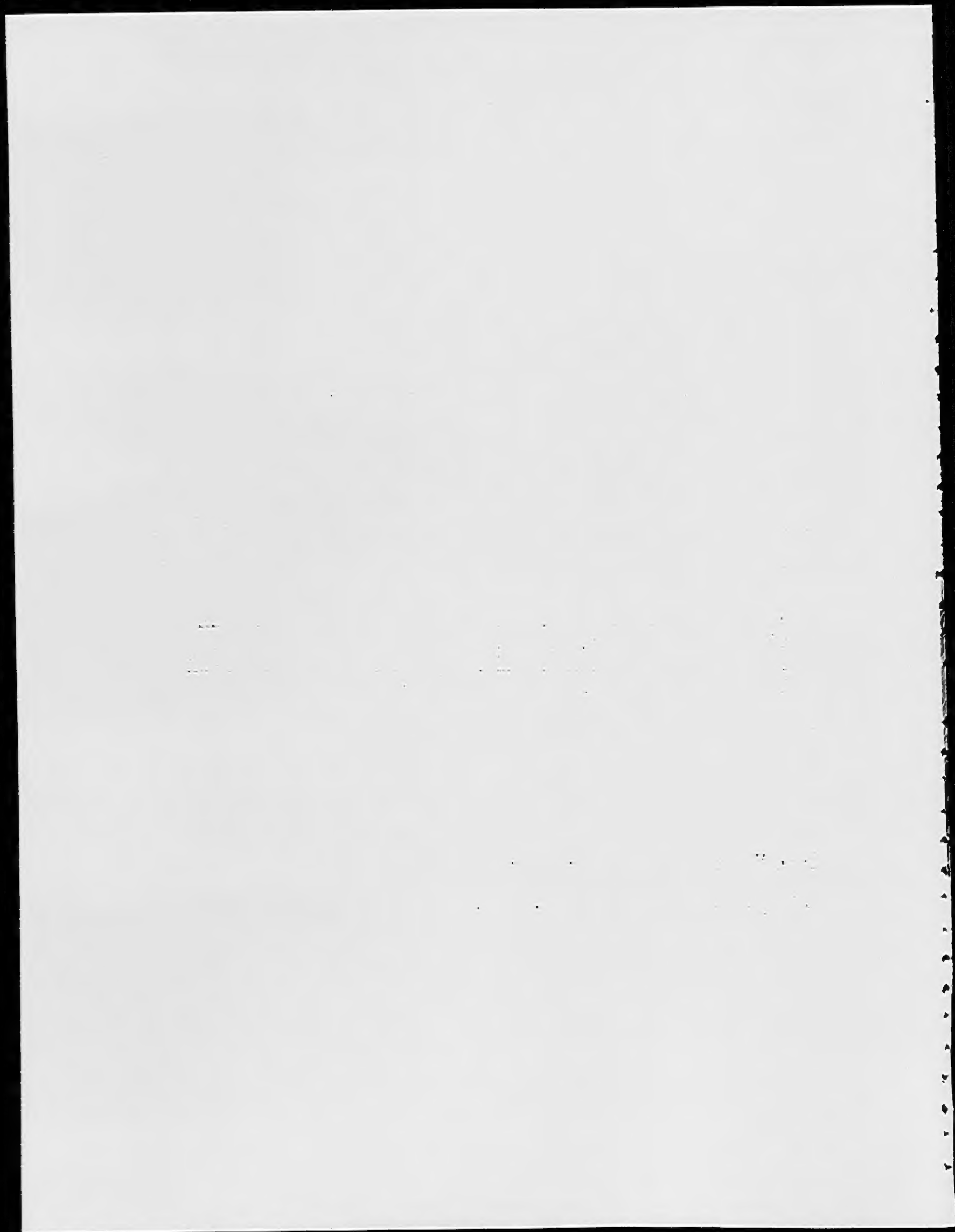
INDEX

	<u>PAGE</u>
Statement of Questions Presented	
Jurisdictional Statement	1
Statutes and Rules Involved In Appeal	2
United States Constitution, Sixth Amendment	
Federal Rules of Criminal Procedure, Rule 48(b)	
Statement of the Case	3,4
Statement of Points	4,5
Summary of Argument	5,6
Argument	6,7,8
I. <u>The Court Below Erred In Not Granting Defendant's</u> <u>Motion For Discharge For Want of a Speedy Trial In</u> <u>Contravention of His Rights Under The Sixth Amendment</u> <u>to The United States Constitution.</u>	
Conclusion	8

CASES

U.S. v. Dillon, 183 F.Supp. 541

U.S. v. McWilliams, 69 F.Supp. 812



UNITED STATES COURT OF APPEALS
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RICHARD H. WARD,)	
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Appellant,)	
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v.)	No. 18,420
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UNITED STATES OF AMERICA,)	
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Appellee.)	
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BRIEF FOR APPELLANT

Jurisdictional Statement

Appellant was convicted in the United States District Court for the District of Columbia under a three-count indictment for violation of U.S.C. Title 26, Sections 4704 (a) and 4705 (a), and U.S.C. Title 21, Section 174 (sale, possession and facilitation of concealment and sale of narcotic drugs, knowing same to have been imported contrary to law). Judgment was entered on January 24, 1964, and appellant was sentenced to a term of imprisonment for a period of ten (10) years. Appellant filed a petition for leave to prosecute an appeal without prepayment of cost. Said petition was granted by the United States District Court for the District of Columbia. Said Court further ordered all of the transcript to be prepared. The jurisdiction of this Court is invoked pursuant to U.S.C. Title 28, Section 1291.



STATUTES AND RULES INVOLVED IN APPEAL

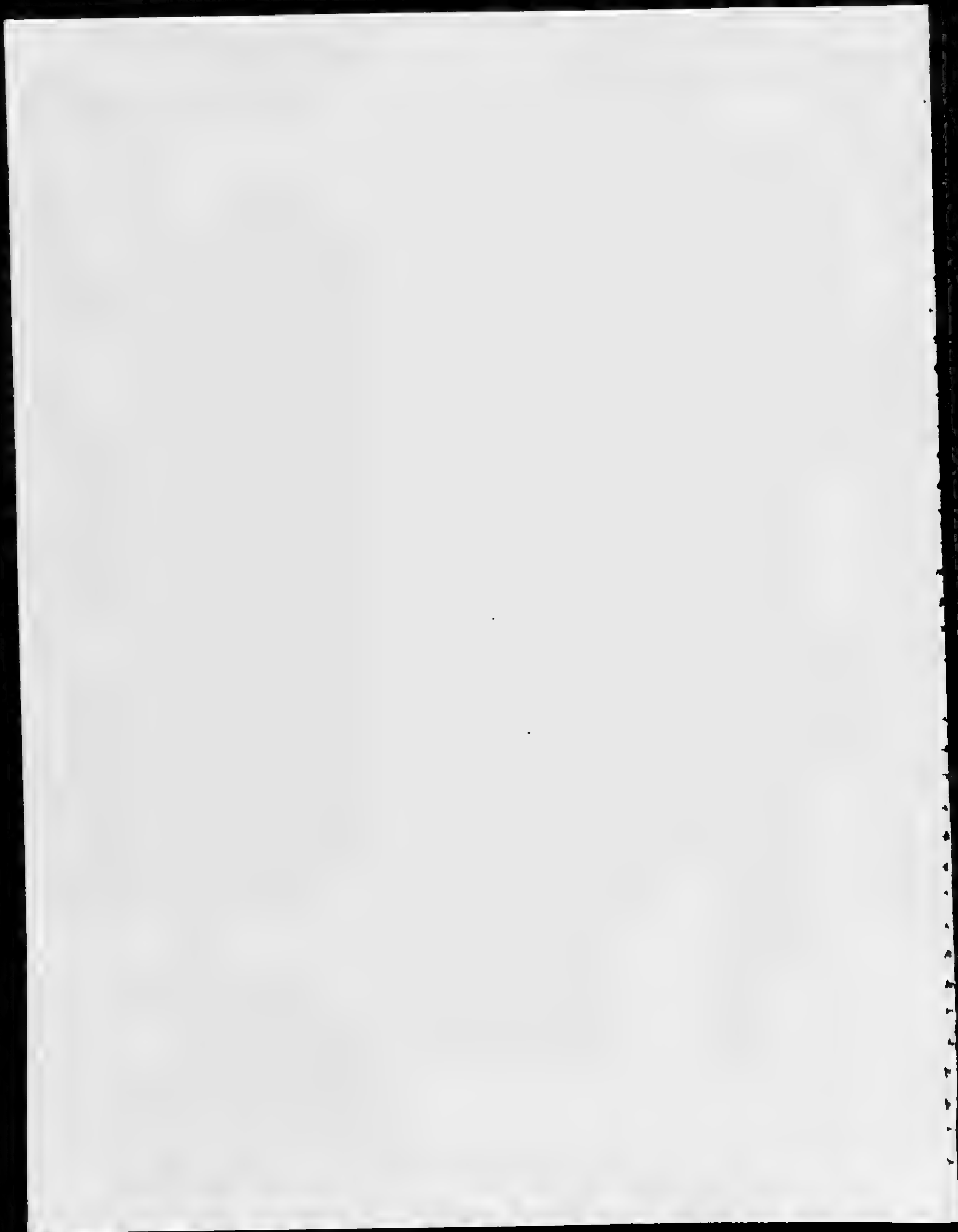
United States Constitution, Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

Federal Rules of Criminal Procedure, Rule 48. Dismissal - (b).

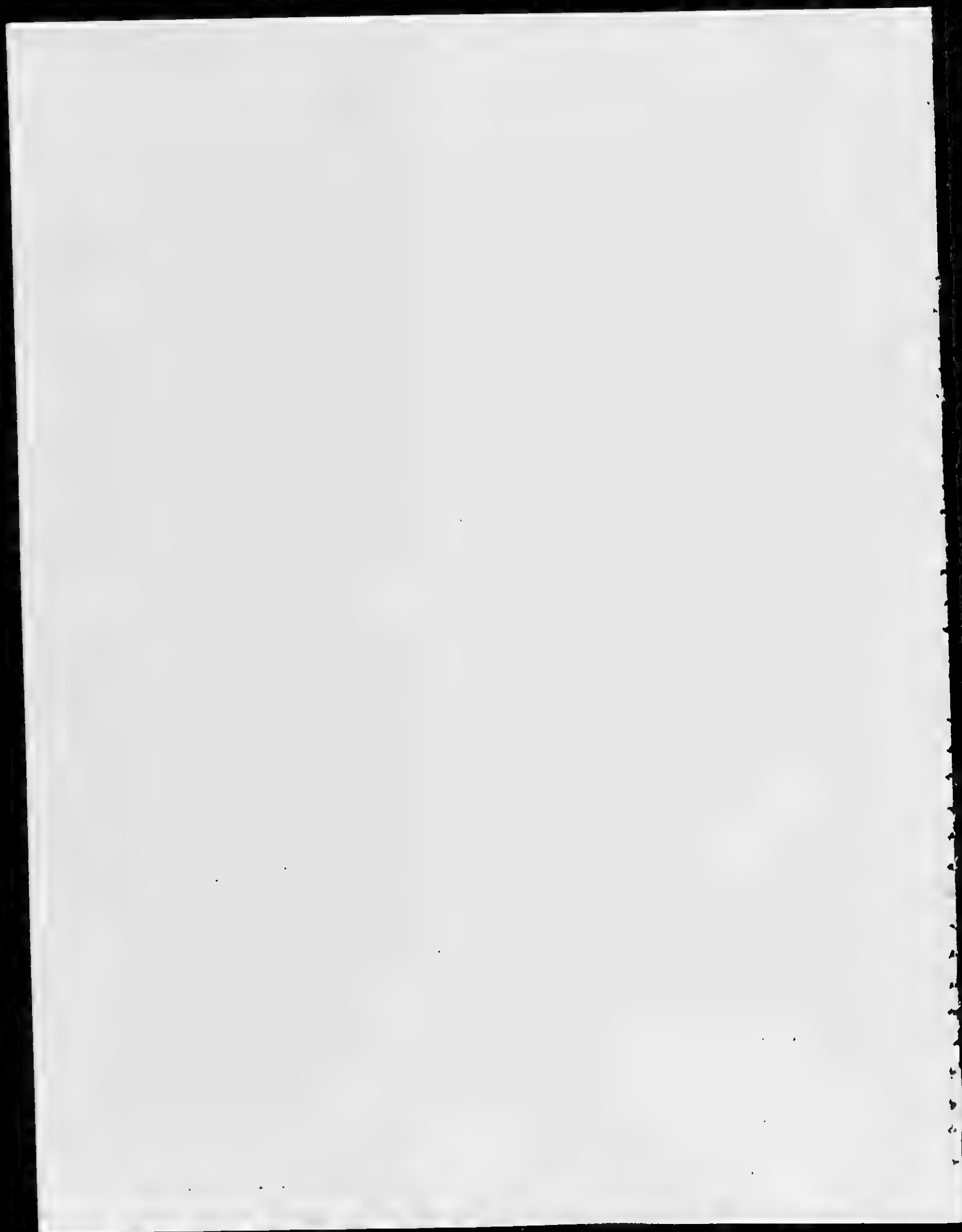
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"If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the District Court, or if there is unnecessary delay in bringing a defendant to trial, the Court may dismiss the indictment, information or complaint."



STATEMENT OF THE CASE

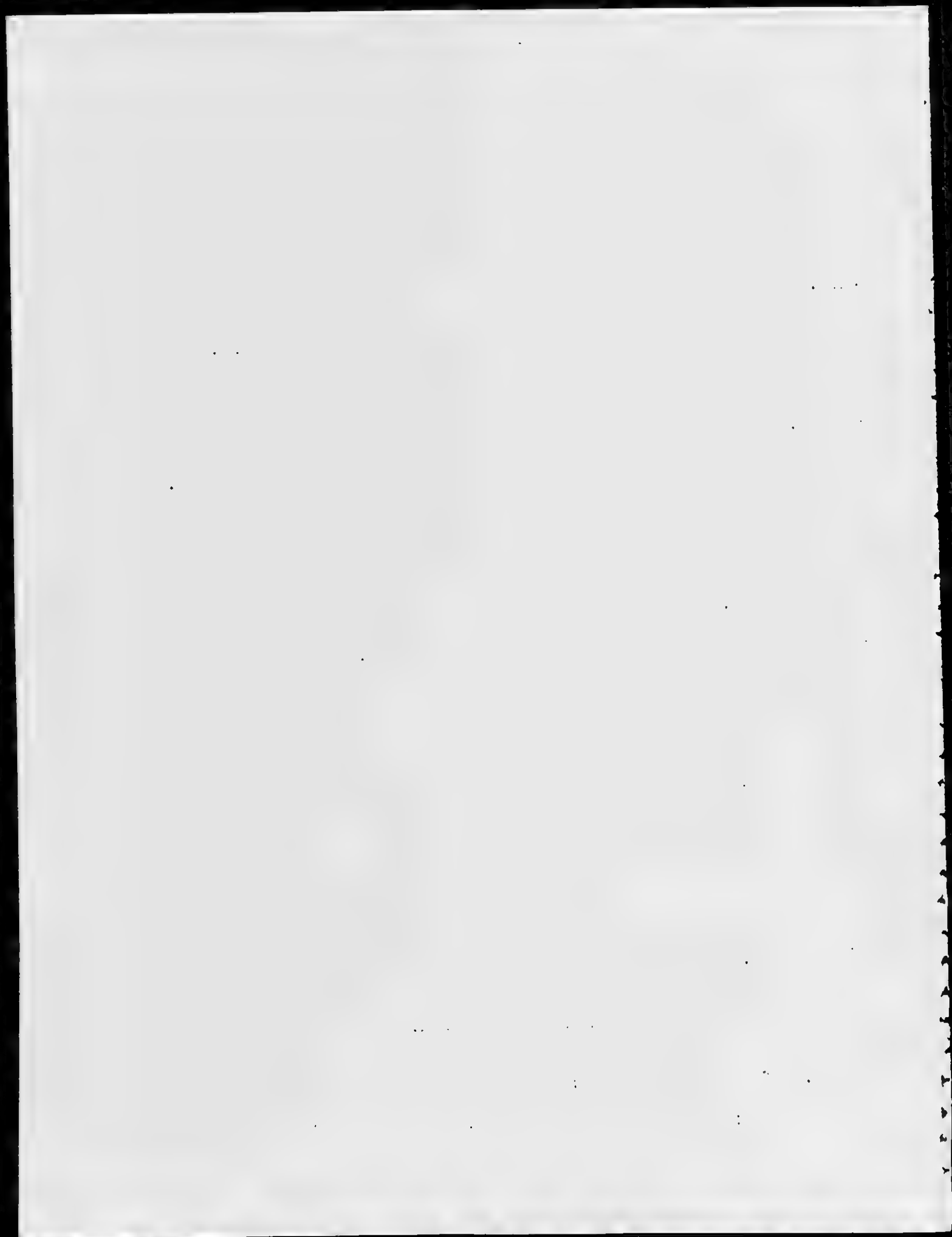
The defendant, Richard H. Ward, was arrested on January 9, 1963, by the Metropolitan police on completely different charges within the jurisdiction of the District of Columbia Court of General Sessions. Said charges were other than the narcotic charges for which the defendant was convicted in the Court below and which is subject of appellant's appeal. Defendant was arraigned in the District of Columbia Court of General Sessions for the initial charges January 10, 1963, and was committed to the D.C. Jail to await trial on said charges in the District of Columbia Court of General Sessions. While committed to jail, he was arrested on a warrant issued by the U.S. Commissioner and brought before the U.S. Commissioner on March 28, 1963, on the narcotics charges subject of this appeal. A hearing was held before the U.S. Commissioner without defendant being represented by counsel. However, on objection of defendant to the Commissioner's filing of probable cause, said U.S. Commissioner set aside his findings of probable cause and ordered a new hearing before the Commissioner which was held on April 23, 1963, at which time the appellant was represented by counsel. At said hearing, the U.S. Commissioner made a finding that there was probable cause to hold the defendant for the action of the grand jury on the narcotics charges subject of this appeal. Defendant was again remanded to the D.C. Jail.



The grand jury indicted the defendant on May 20, 1963, on the narcotics charges subject of this appeal. In the interim while the defendant was still confined in Jail, the initial charges for which he was awaiting trial in the District of Columbia Court of General Sessions were dismissed by said Court on June 12, 1963. The defendant still remained in the D.C. Jail awaiting trial on the narcotics violations subject of this appeal. Defendant was arraigned on said narcotic violations on May 24, 1963, and a trial date was set for June 26, 1963. On said date, the trial was continued at defendant's request because of failure of the Government to apprehend an alleged co-defendant. On said date, a final trial date for the defendant was scheduled for October 9, 1963. The record is void as to why the trial of the defendant was not held on October 9, 1963, since it appears that defendant was ready to stand trial. After being denied without prejudice motion to dismiss charges against defendant for failure to grant him a speedy trial, defendant was finally brought to trial on December 2, 1963, and convicted of the narcotics charges subject of this appeal.

STATEMENT OF POINTS

1. The Court below erred in not granting defendant's Motion for discharge for want of a speedy trial in contravention

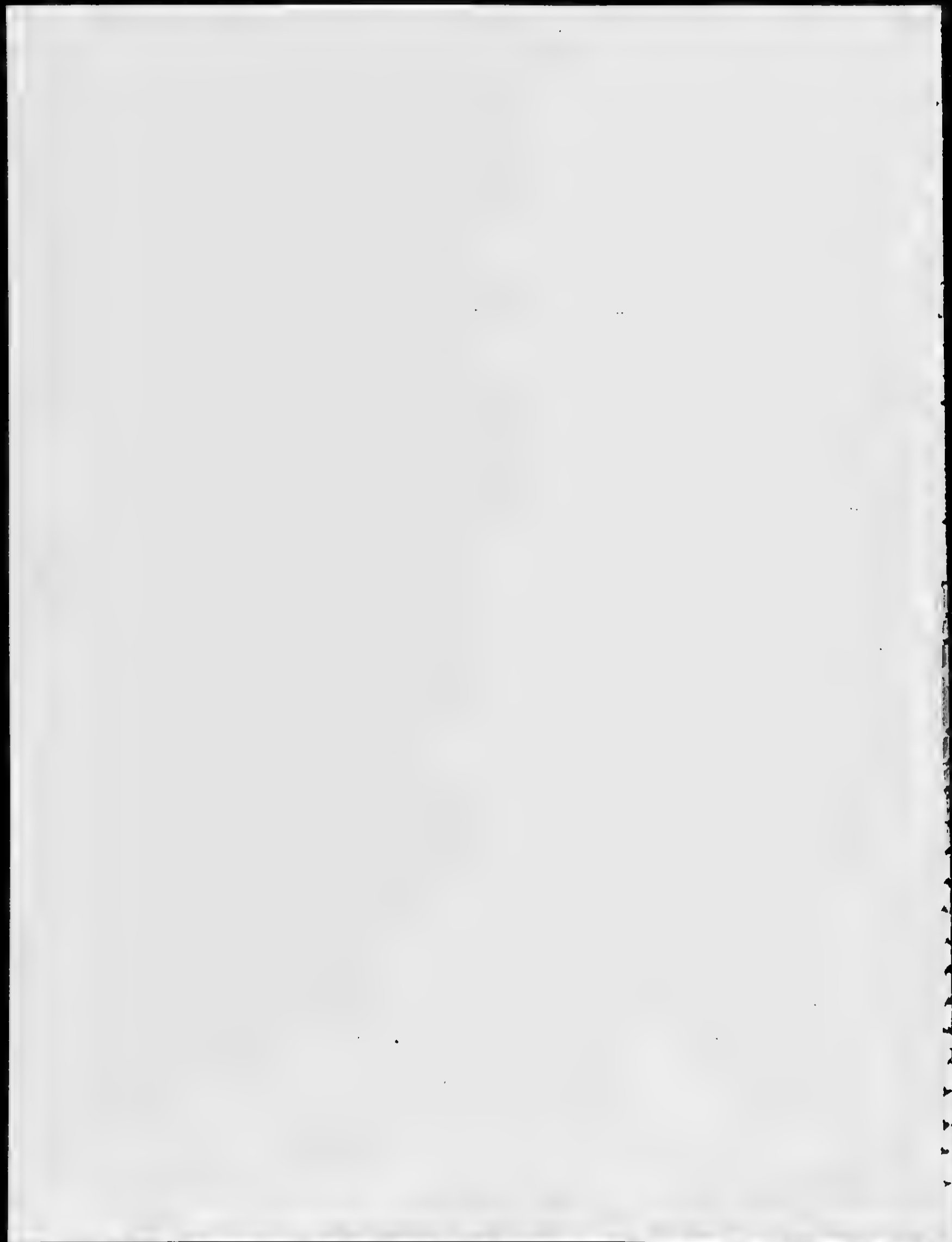


of his rights under the Sixth Amendment to the United States Constitution.

SUMMARY OF ARGUMENT

The position of the appellant is that he was not given a speedy trial on the charges on which he was convicted and that the denial of said speedy trial was in contravention of his rights afforded to him under the Sixth Amendment to the United States Constitution.

The Appellant further contends that the Court below erred in denying his Motion to discharge for lack of a speedy trial for reason that the entire record of the proceedings shows error pertaining to appellant's initial arrest; his long confinement in jail while the Government had knowledge of his alleged violations; his appearance twice before the U.S. Commissioner, the first time without counsel prior to his indictment; the Government's failure to apprehend appellant's alleged co-defendant and allow appellant to be confronted by him prior to trial, although it appeared that the Government knew of the whereabouts of said alleged co-defendant. All of the foregoing appellant contends are in contravention of his rights



afforded to him under the Sixth Amendment to the United States Constitution.

ARGUMENT

I

With respect to Point I, Appellant desires the Court to read the following pages of the reporter's transcript:

Proceedings before Judge George L. Hart, June 26, 1963, TR. 10-11 inclusive.

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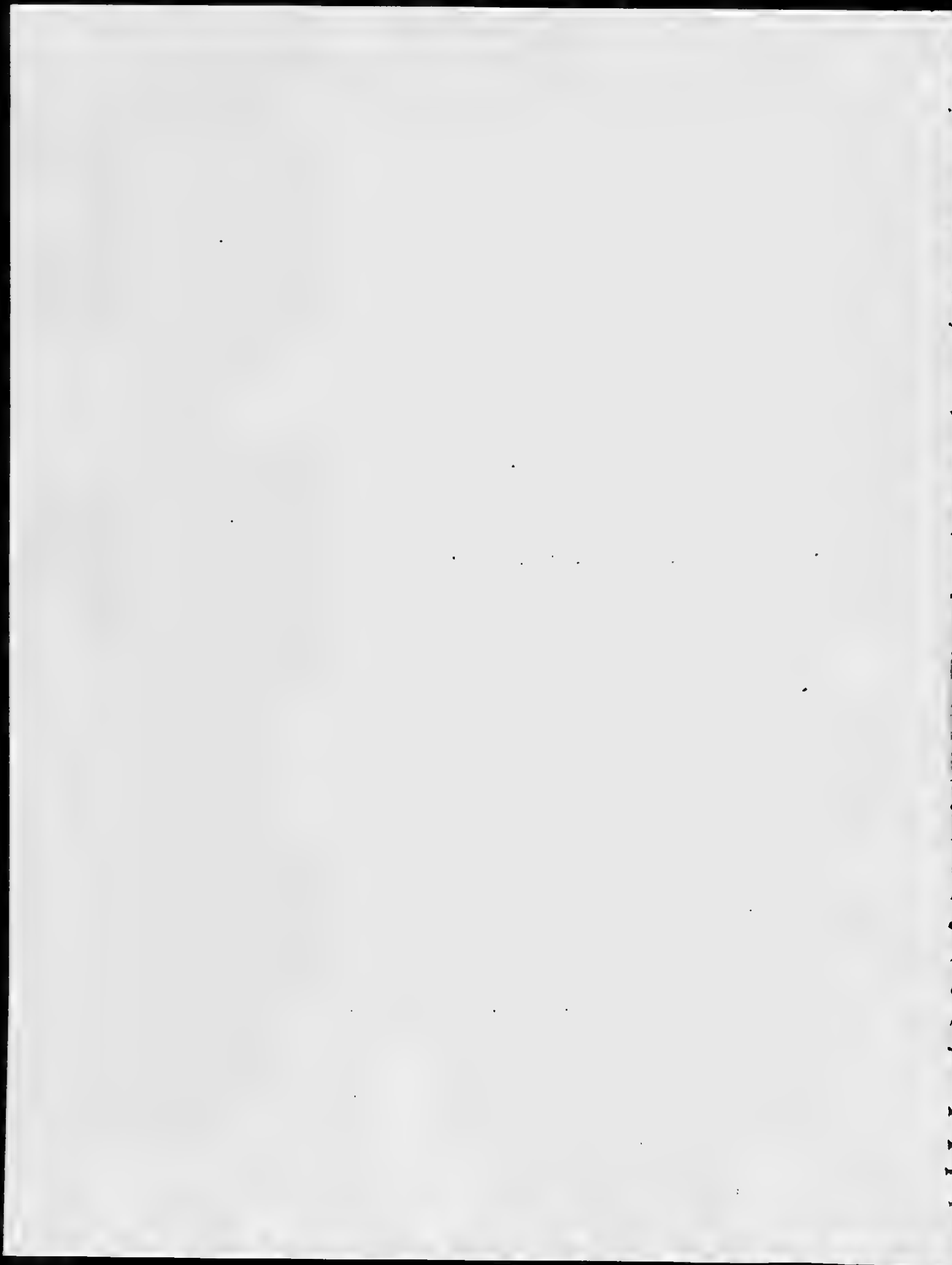
The Sixth Amendment to the United States Constitution states:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

In the instant case although appellant was initially arrested and committed to the D.C. Jail for offenses other than the narcotics charges subject of this appeal, the Government



on to-wit: March 15, 1963, allegedly identified appellant as the person accused of the offenses subject of this appeal which the Government stated was committed on January 9, 1963. Appellant contends that the Government was dilatory in making its arrest and placed greater importance on the work of its so-called undercover agents than upon the rights of the appellant to a speedy trial afforded him under the Sixth Amendment to the United States Constitution, and further implemented by Federal Rules of Criminal Procedure, Rule 48(b); U.S. v. Dillon, 183 F.Supp. 541; U.S. v. McWilliams, 69 F.Supp. 812. The Government also was dilatory in not apprehending appellant's alleged co-defendant, although it appears they knew his whereabouts. Appellant's position on this Appeal is that the Government's long delay between the date of the alleged narcotic violation and the filing of the complaint had impaired defendant's defense considerably all in violation of his constitutional rights. The previous proceedings before Judges Hart and Youngdahl prior to the formal trial before Judge Schweinhaut repeatedly reiterated that the appellant would be brought to trial October 9, 1963, and said trial date set by said Judges was utterly disregarded and ignored, although the record appears that appellant was ready for trial on October 9, 1963. The Government's handling of the alleged co-defendant, Harold Young, delayed appellant's trial and said appellant



contends that he has been denied a speedy trial when he is alleged to have committed offenses subject of this Appeal on January 9, 1963, and due to delays through no fault of his own he is brought to trial almost one year later. Said delays were in violation of his constitutional rights to a speedy trial afforded him under the Sixth Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons, appellant urges that his conviction be reversed and the case remanded, with instructions to enter a judgment of acquittal.

Respectfully submitted,

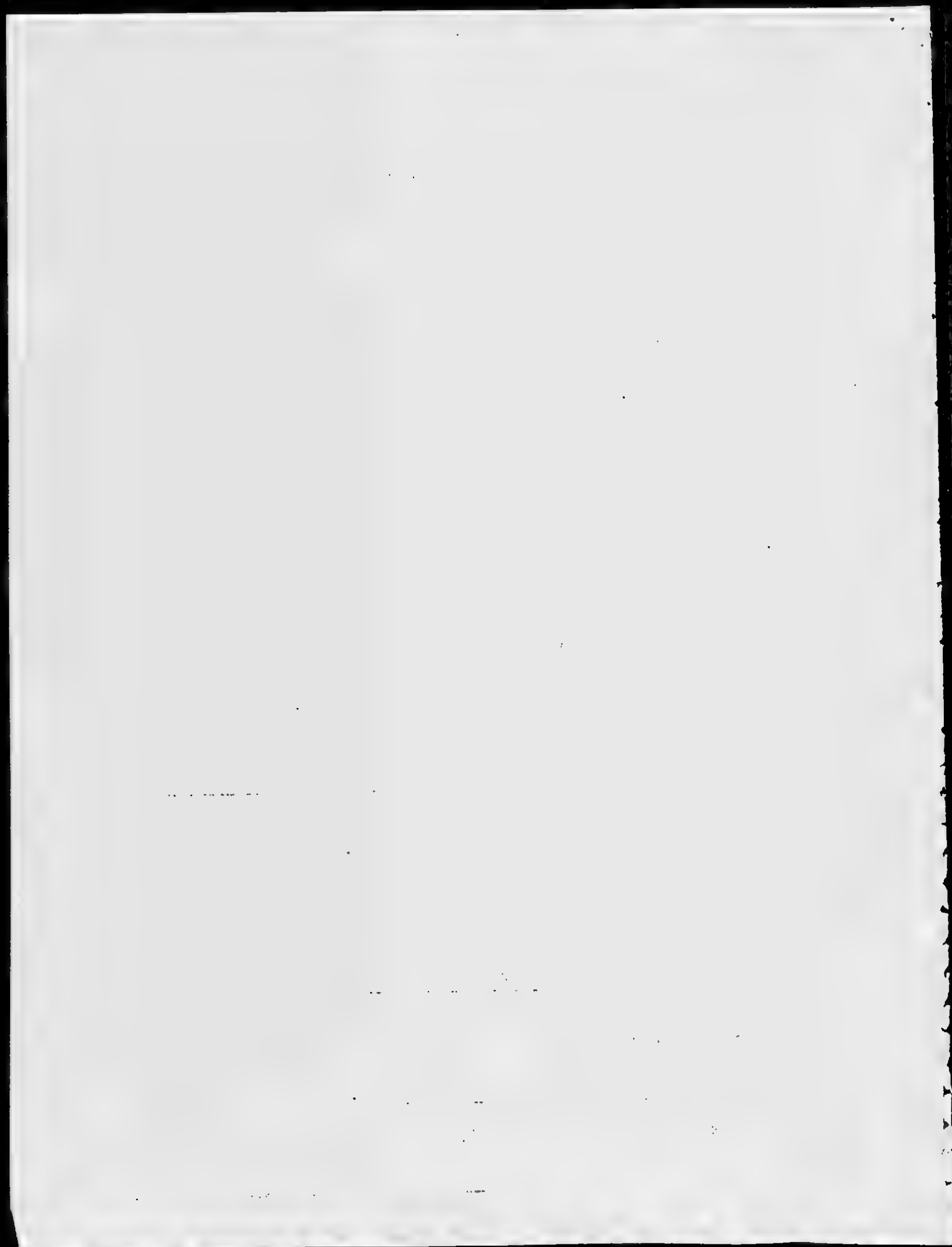
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Counsel for Appellant
Appointed by This Court

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Brief was delivered in person this _____ day of _____, 1964, to the Office of United States Attorney, David C. Acheson.

H. Edward Chozick



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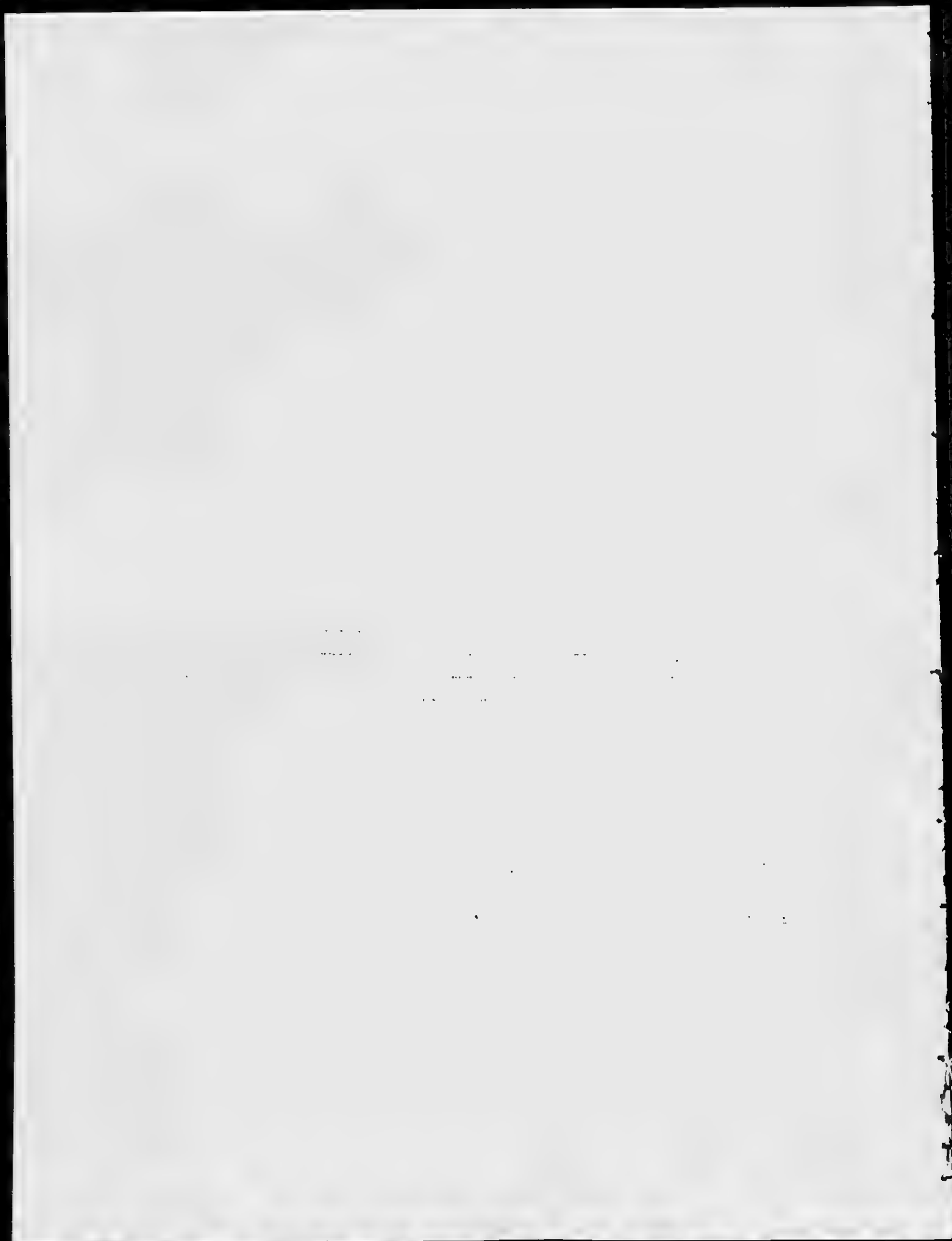
INDEX

	<u>PAGE</u>
Statement of Questions Presented	
Jurisdictional Statement	1
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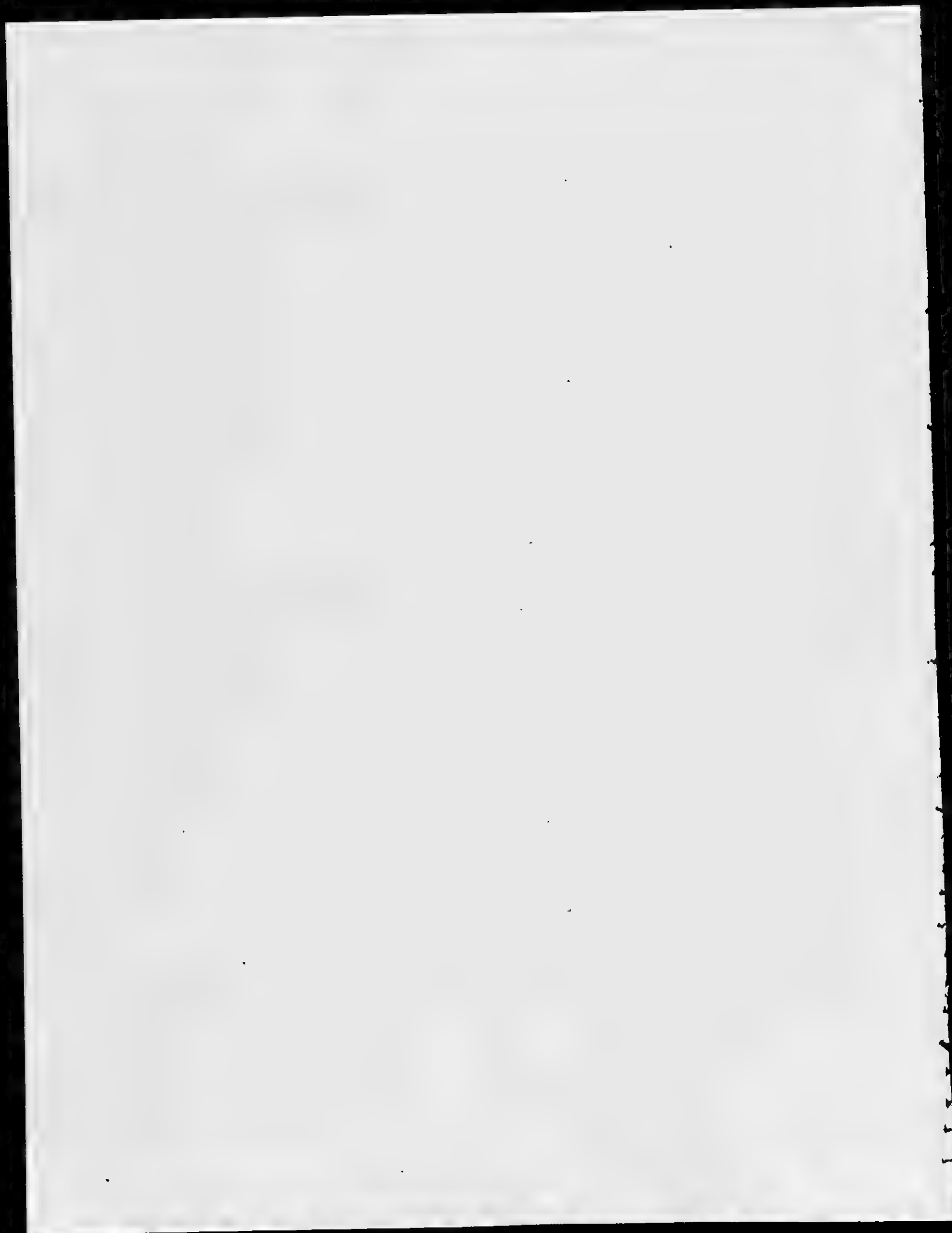
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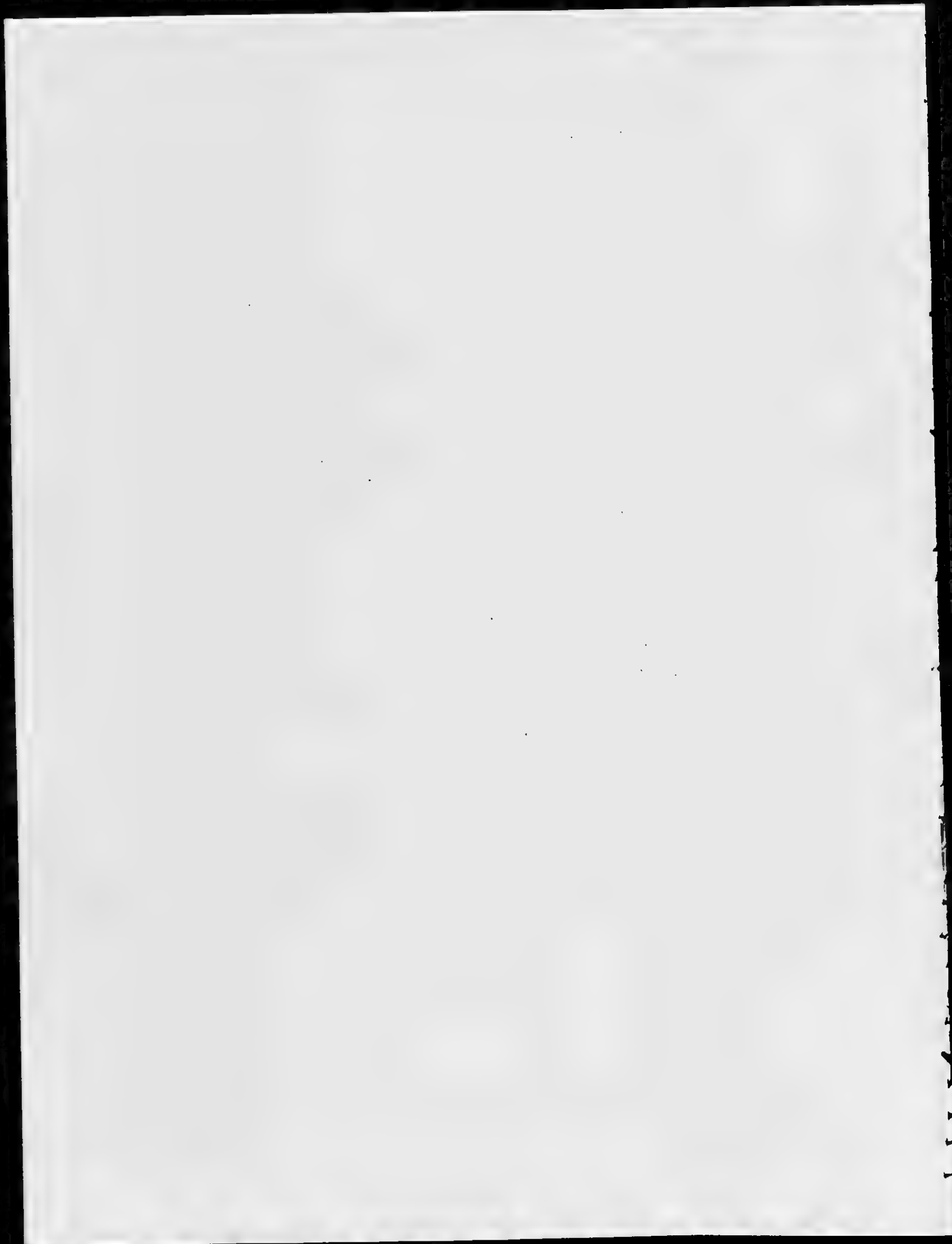
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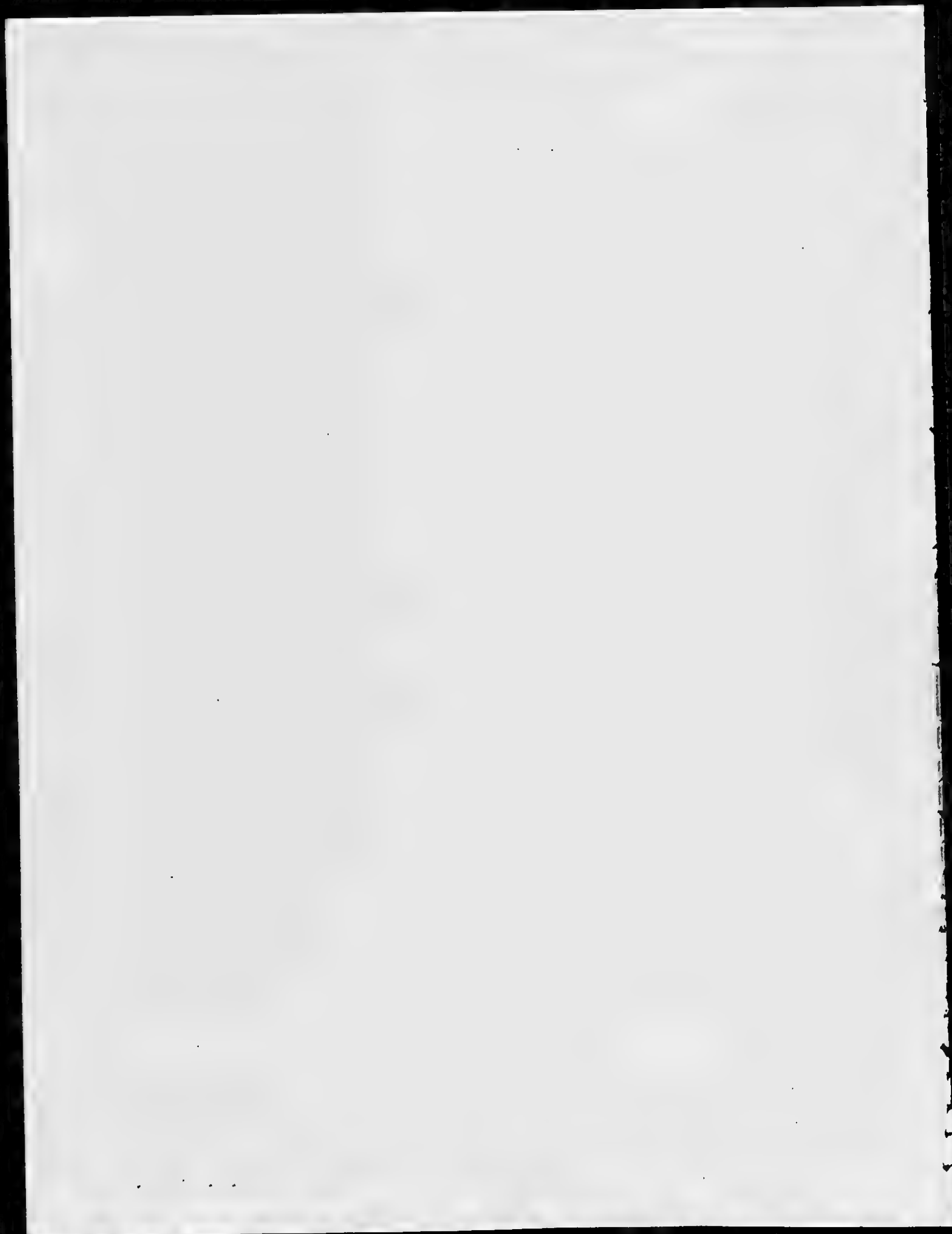
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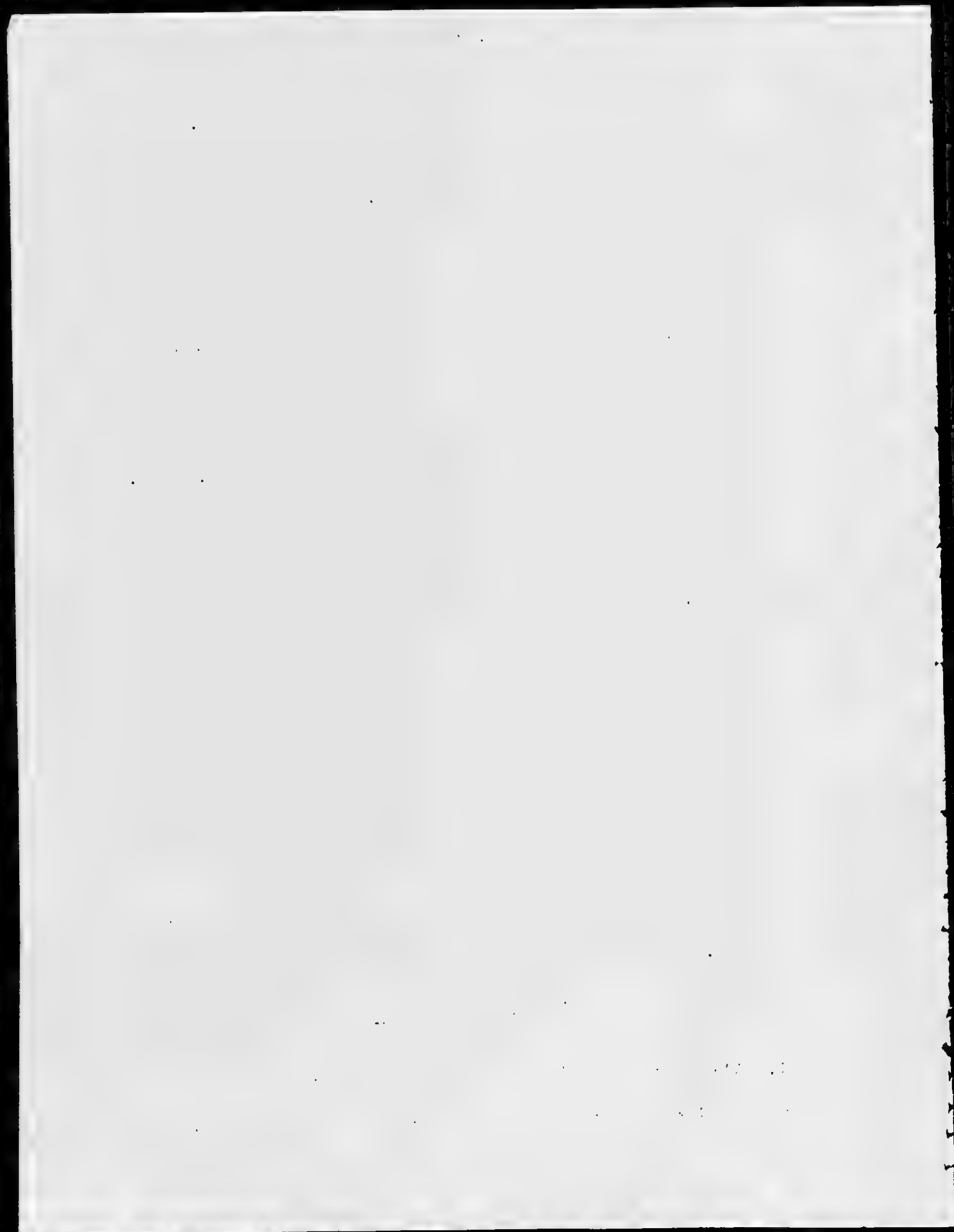
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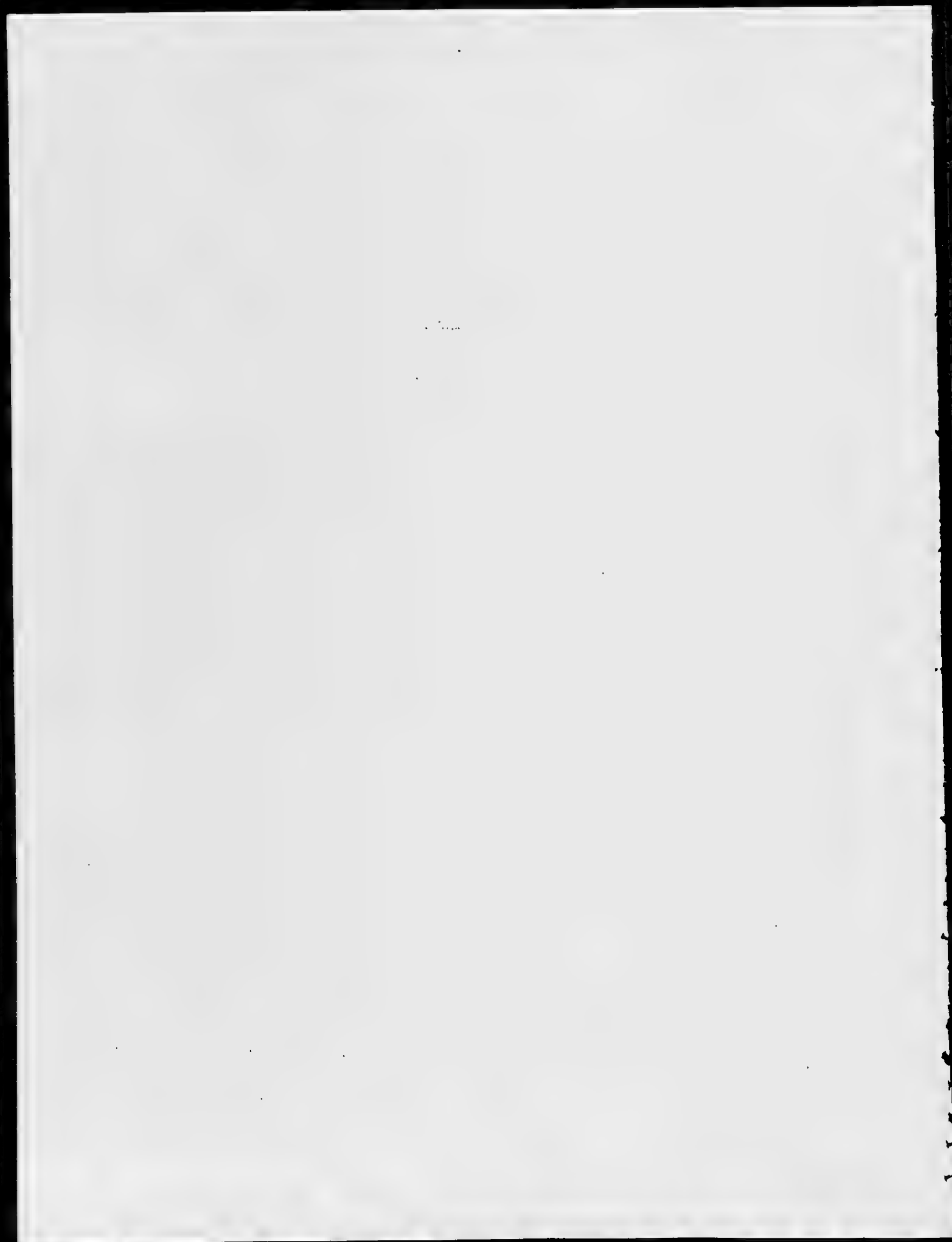


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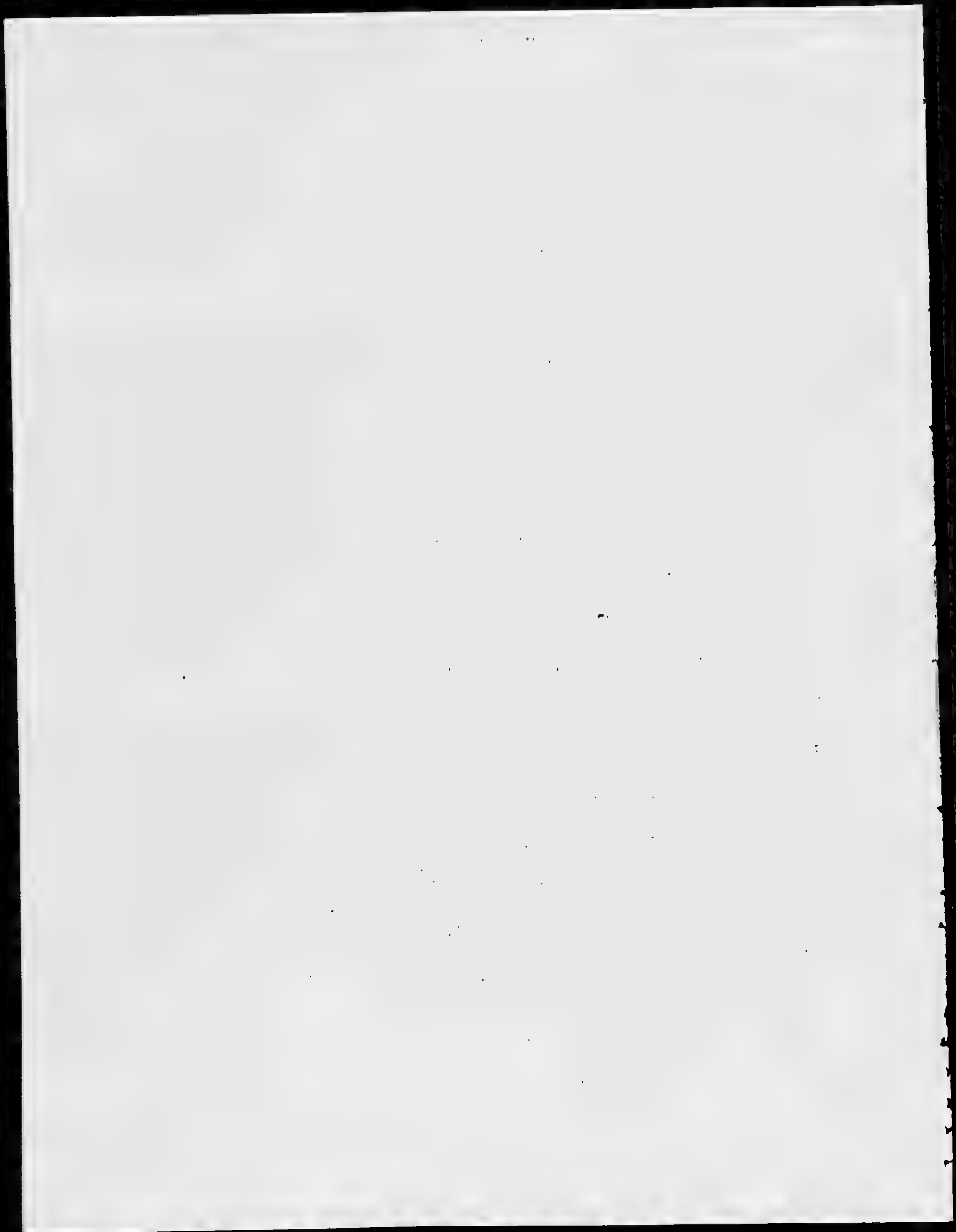
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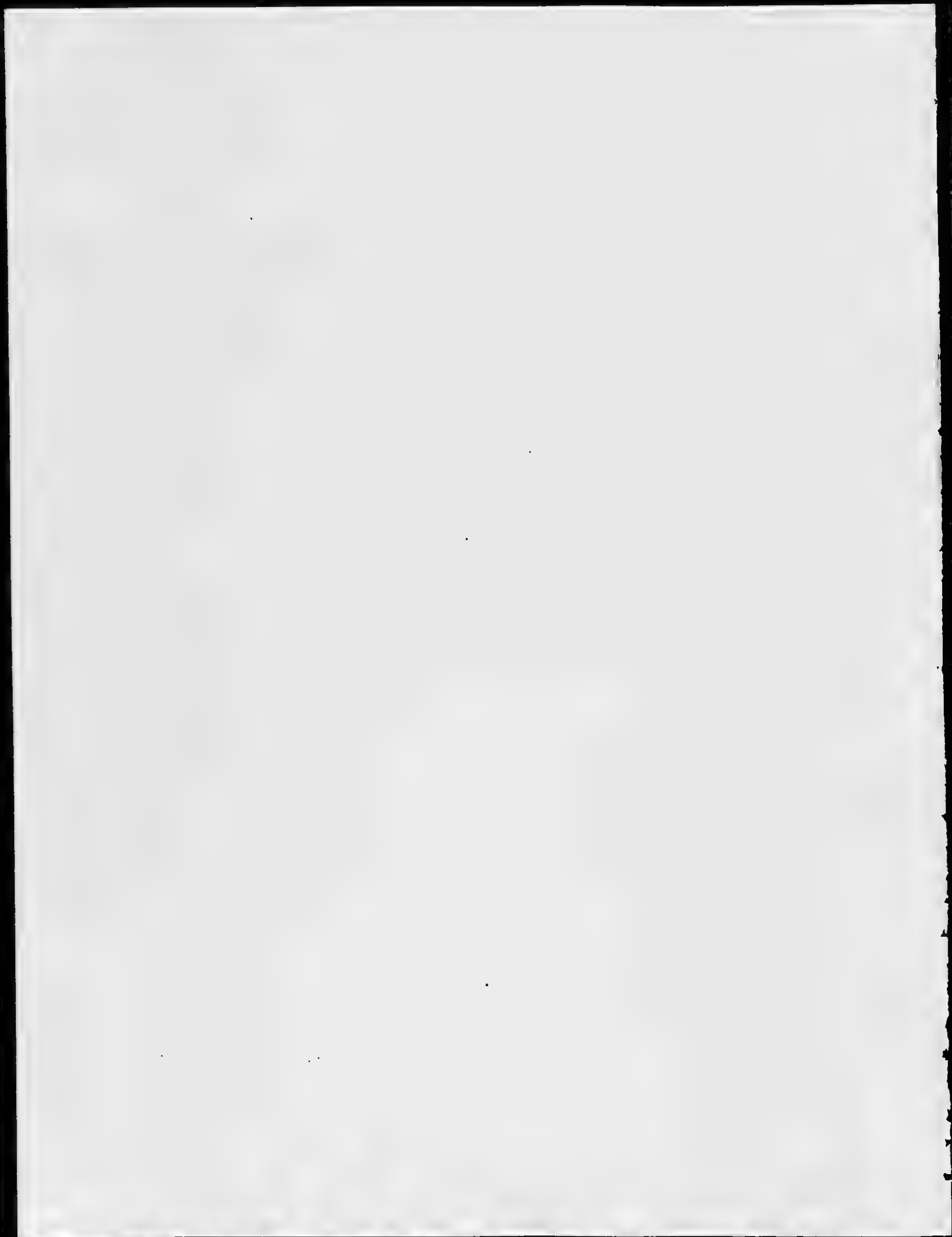
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Counsel for Appellant
Appointed by This Court

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I hereby certify that a copy of this Brief was delivered in person this _____ day of _____, 1964, to the Office of United States Attorney, David C. Acheson.

H. Edward Chozick

BRIEF FOR APPELLEE AND APPENDIX

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18420

RICHARD H. WARD, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEEBEKER,
VICTOR W. CAPUTY,
JOHN A. TERRY,
Assistant United States Attorneys.

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 6 1964

Nathan J. Paulson
CLERK



QUESTION PRESENTED

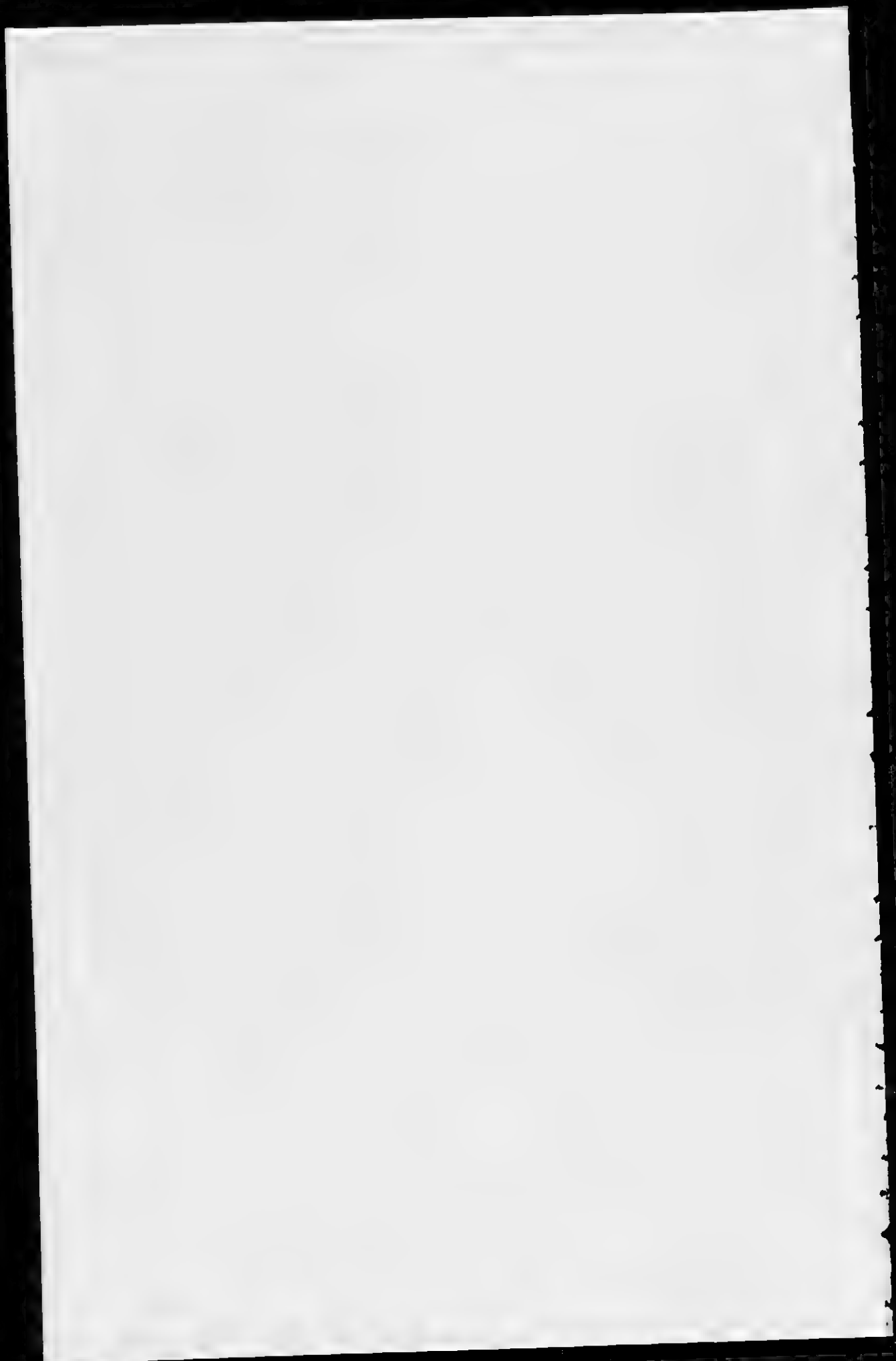
Was appellant denied his constitutional right to a speedy trial by reason of four continuances totaling slightly more than five months where:

(a) none of the continuances were requested by or attributable to the Government;

(b) one continuance of three and one-half months was granted at appellant's express request after both the court and his counsel had thoroughly discussed the matter with him, the Government having announced ready for trial;

(c) one continuance of three weeks was granted at the request of appellant's co-defendant; and

(d) the two remaining continuances resulted from congestion of the criminal trial calendar and the death of President Kennedy?



INDEX

	Page
Counterstatement of the case.....	1
Constitutional provision involved.....	5
Statutes involved.....	5
Summary of argument.....	6
Argument:	
Appellant was not denied his constitutional right to a speedy trial.....	7
Conclusion.....	11
Appendix.....	13

TABLE OF CASES

* <i>Beavers v. Haubert</i> , 198 U.S. 77 (1905).....	10
<i>Davidson v. United States</i> , 312 F.2d 163 (8th Cir. 1963)....	10
<i>King v. United States</i> , 105 U.S. App. D.C. 193, 265 F.2d 567, cert. denied, 359 U.S. 998 (1959).....	9
<i>Mack v. United States</i> , 326 F.2d 481 (8th Cir.), cert. denied, 84 S. Ct. 1355 (1964).....	8
* <i>Mattoon v. Rhay</i> , 313 F.2d 683 (9th Cir. 1963).....	8, 10
<i>Nickens v. United States</i> , 116 U.S. App. D.C. 338, 323 F.2d 808 (1963).....	8
<i>Pollard v. United States</i> , 352 U.S. 354 (1957).....	10
* <i>Shepherd v. United States</i> , 163 F.2d 974 (8th Cir. 1947) ...	8
* <i>Smith v. United States</i> , — U.S. App. D.C. —, — F.2d — (No. 17106, decided February 20, 1964).....	10
<i>Turberville v. United States</i> , 112 U.S. App. D.C. 400, 303 F.2d 411, cert. denied, 370 U.S. 946 (1962).....	9
* <i>United States v. Kabot</i> , 295 F.2d 848 (2d Cir. 1961), cert. denied, 369 U.S. 803 (1962).....	8
<i>United States v. Kaufman</i> , 311 F.2d 695 (2d Cir. 1963).....	10
<i>United States v. Lustman</i> , 258 F.2d 475 (2d Cir.), cert. denied, 358 U.S. 880 (1958).....	10
* <i>United States v. McWilliams</i> , 82 U.S. App. D.C. 259, 163 F.2d 695 (1947).....	11
<i>United States v. Postma</i> , 242 F.2d 488 (2d Cir.), cert. de- nied, 354 U.S. 922 (1957).....	9
* <i>United States v. Research Foundation, Inc.</i> , 155 F. Supp. 650 (S.D.N.Y. 1957).....	11
<i>United States v. Tane</i> , 329 F.2d 848 (2d Cir. 1964).....	11

* Cases chiefly relied upon are marked by asterisks.



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**Appeal from the United States District Court
for the District of Columbia**

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

A glassine envelope containing about 170 milligrams of white powder was sold for \$12 to Rufus Moore on January 9, 1963, by Richard H. Ward and Harold Young. Unknown to the sellers, Moore was an undercover police officer assigned to the Narcotics Squad. The white powder subsequently was analyzed and turned out to be a mixture of heroin hydrochloride and mannitol, and as a result Ward and Young were indicted on May 20, 1963, for

violations of the federal narcotics laws.¹ Young entered a plea of guilty to the second count of the indictment on December 2, 1963,² and immediately thereafter Ward alone went to trial on the entire indictment before Judge Schweinhaut of the District Court. After a lengthy trial he was found guilty by the jury, and on January 24, 1964, he was sentenced to serve ten years in prison. The trial court granted leave to appeal *in forma pauperis*.

Appellant was arraigned on May 24, 1963, and at that time trial was set for June 26. On that date the case was sent to Judge Hart for trial. The Government announced ready (H. Tr. 2).³ Appellant's counsel, however, requested a continuance:

MR. MAYNARD:⁴ . . . The defense of Richard Ward's case is mistaken identity, and his contention is that he never knew or never met a person by the name of Harold Young.

We feel that it would be prejudicial, of course, to go to trial without Harold Young being here without the knowledge of what Harold Young's testimony might be with respect to who the co-defendant was; and therefore it is the position of the defendant that he cannot safely go to trial at this time until Harold Young is found. There is a bench warrant outstanding and it has not been executed. . . . [H]e doesn't feel in his own mind, doesn't feel that he can stand trial without this co-defendant. He wants to go to trial with the co-defendant and, Your Honor, he knows what he is facing in the way of maximum

¹ 26 U.S.C. § 4704(a) (count two), 26 U.S.C. § 4705(a) (count one), and 21 U.S.C. § 174 (count three).

² At the time of sentencing the remaining counts were dismissed as to Young.

³ "H. Tr." refers to the transcript of proceedings before Judge Hart on June 26, 1963; "Y. Tr." refers to the transcript of proceedings before Judge Youngdahl on September 6, 1963. The trial transcript of December 2-6, 1963, is cited simply as "Tr."

⁴ Mr. Maynard subsequently was obliged to withdraw from the case, and appellant was represented at his trial by another attorney.

sentences and he would be willing to wait for an indefinite period of time pending the arrest of this co-defendant.

MR. CAPUTY: I am ready to proceed, if Your Honor please. (H. Tr. 2-3)

The court then questioned appellant personally, informing him that if the case were continued it would not be tried until at least October and reminding him that in the interim he would remain in jail. Appellant replied:

Well, Your Honor, the reason that I request a continuance in the case is because that I am co-defendant in this case with Mr. Harold Young, as was stated in the Commissioner's proceedings, was the principal and Mr. Harold Young would be the only one to say whether I was the party that he obtained these drugs from and the only way that I can prove my innocence is through Mr. Young.

* * * *

THE COURT: Well, the choice is going to be yours.

Now, you are entitled to a speedy trial, and we are here ready, able and willing to give you a trial this morning. If this matter is continued, you may not get a trial till after October. In the meantime you are staying in jail getting no credit for it; and that's not a very good thing but you have got to make the choice.

Now, do you wish to waive your right to a speedy trial today and request a continuance until October—and realize this too: That it is possible that Young may not be found by October, in which event you would have to go to trial without Young.

Now, in view of all those circumstances, do you still want to continue this matter?

DEFENDANT WARD: Yes, I still think that I should have Mr. Young here too. (H. Tr. 6-7)

As the discussion continued, appellant also stated that he was not prepared to go to trial because he had not obtained certain witnesses, whom he named (H. Tr. 8). His

counsel thereupon requested a continuance on the additional ground that he had not previously known of such witnesses. The court told appellant to make up his mind, and appellant consulted privately with his counsel, who then returned to the bench and stated:

If it please the Court, I believe the defendant has made his decision in favor of asking for the continuance. He fully realizes the consequences. He feels that he cannot safely go to trial. He indicated to me at counsel table that he does wish a continuance in this matter even though it means waiting until October for a trial.

Is that right, Mr. Ward?

DEFENDANT WARD: Yes, sir. (H. Tr. 10)

The trial was accordingly continued until October 9.

Appellant remained of the same mind at least until September 6, when he appeared before Judge Youngdahl on a motion for release on his personal recognizance. At that time Judge Youngdahl noted that the case had been set for trial on October 9 and told appellant, as Judge Hart had told him previously, that the trial would proceed on that date with or without the other defendant. Appellant reiterated his earlier allegation that he did not know Young nor had ever seen him and stated, "I don't want to go to trial" (Y. Tr. 8).

A few lays later Young was apprehended, and on September 27 he was arraigned. On that date Young's counsel asked for a continuance because he had just come into the case⁵ and because Young had so recently been found. The case was continued for three weeks at the request of Young's counsel, from October 9 to October 30, over the objection of appellant (Tr. 171, 181, 212). On October 30 the case did not go to trial because there were no criminal courts available, and after being carried over from day to day for the rest of the week the case was continued once again to November 25 (Tr. 172, 175).

⁵ He was appointed on September 24.

The court was not in session on that date because of the death of President Kennedy, and the case was put over for one week until December 2.⁶ On the morning of December 2 the case was sent to Judge Schweinhaut for trial. At that time Young withdrew his plea of not guilty and entered a plea of guilty to count two of the indictment. Appellant's trial then began and culminated in a verdict of guilty on all three counts.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATUTES INVOLVED

Title 21, § 174, United States Code, provides:

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States con-

⁶ Appellant of course did not object to the last continuance (Tr. 172, 180-181).

For the convenience of the Court, all the continuances up to the beginning of the trial are listed in tabular form in the Appendix, *infra*.

trary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than \$20,000.

Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954.

Title 26, § 4704(a), United States Code, provides:

It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

Title 26, § 4705(a), United States Code, provides:

It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

SUMMARY OF ARGUMENT

Of the five months during which appellant's trial was continued, three and one-half months—approximately 70% of the total—were attributable directly to appellant. He

sought a continuance because of the absence of his co-defendant, and the court granted it only after appellant was fully advised of the consequences both by the court and by his own attorney. To this he cannot now object. Each of the remaining continuances had a legitimate, reasonable basis, and neither singly nor in combination do they constitute a delay so "purposeful or oppressive" as to violate appellant's Sixth Amendment right. Appellant claims that the trial court erred in denying his motion to dismiss the indictment for lack of a speedy trial. But such motions are addressed to the discretion of the court, and the record reveals no abuse of that discretion, nor does appellant allege any. Moreover, there is no indication that appellant was in any way prejudiced by the delay of which he now complains, assuming *arguendo* the validity of his complaint. In determining whether the right of an accused to a speedy trial has been violated, the courts must consider each case independently in the light of its own individual facts and circumstances. They must balance the rights of the accused against the rights of public justice. Appellant's contentions, when weighed in the balance, can only be found wanting.

ARGUMENT

Appellant was not denied his constitutional right to a speedy trial

(Tr. 156-181, 211-213, 296-297, 365-373, 377-380; H. Tr. 1-12; Y. Tr. 8)

The delay in appellant's trial of which he now complains was largely of his own making. Excluding the final continuance of one week from November 25 to December 2, which resulted from the death of the President and to which appellant made no objection (Tr. 172, 180-181), the continuances totaled almost exactly five months.⁷

⁷ The period between the offense (January 9) and the issuance of the complaint (March 15) does not come under the aegis of the

Three and one-half of these months can be charged directly to appellant; Judge Hart continued the case from June 26 to October 9 at appellant's express request after appellant was advised of the consequences both by the court and by his own attorney. The Government was ready to proceed on June 26, as the record unequivocally shows,⁶ and remained ready at all times thereafter. Common sense dictates that appellant cannot complain that he has been denied his right to a speedy trial while basing his complaint on a delay for which he himself has been primarily responsible. *Mattoon v. Rhay*, 313 F.2d 683 (9th Cir. 1963); *United States v. Kabot*, 295 F.2d 848 (2d Cir. 1961), *cert. denied*, 369 U.S. 803 (1962); *Shepherd v. United States*, 163 F.2d 974 (8th Cir. 1947); cf.

Sixth Amendment, of course, but is governed exclusively by the statute of limitations. Substantially longer intervals between the commission of a crime and the initiation of prosecution have consistently been upheld by the courts. See *Nickens v. United States*, 116 U.S. App. D.C. 338, 323 F.2d 808 (1963), and cases cited therein; *Mack v. United States*, 326 F.2d 481 (8th Cir.), *cert. denied*, 84 S. Ct. 1355 (1964).

A warrant for appellant's arrest on narcotics charges was issued on March 15 and executed on March 28. He was promptly brought before the United States Commissioner, who advised him of his rights under Rule 5(b), F.R.Crim. P., including his right to a preliminary hearing. Appellant elected to proceed with a hearing without counsel. After the Commissioner had heard the evidence, he started to rule that sufficient probable cause had been established for him to hold appellant for the action of the grand jury. At this appellant "became agitated, used a lot of curse words, and protested that his rights had not been protected" (Tr. 379). As a result of appellant's protests, the Commissioner set aside his finding of probable cause and continued the case to a future date, advising appellant that he would get in touch with the Legal Aid Agency so that they might make counsel available for him at that time. See 2 D.C. Code § 2202. A second hearing was held on April 23, this time with appellant represented by counsel, and once again the Commissioner found probable cause and ordered appellant held for the grand jury. (See Tr. 365-373, 377-380.) The indictment against appellant and Harold Young was returned on May 20. Appellant was arraigned four days later, and the case was set for trial on a date approximately one month away.

⁶ See H. Tr. 2. Indeed, had the Government not been ready to proceed, the case would not have been sent out to Judge Hart for trial.

Turberville v. United States, 112 U.S. App. D.C. 400, 303 F.2d 411, *cert. denied*, 370 U.S. 946 (1962); *United States v. Postma*, 242 F.2d 488 (2d Cir.), *cert. denied*, 354 U.S. 922 (1957). When appellant came before Judge Hart in June, he was advised in plain language that he had a right to a speedy trial. In asking for a continuance he expressly waived that right (see H. Tr. 6-7, 10). If he now feels he made a mistake, he has only himself to blame. Twice in open court, once before Judge Hart and once before Judge Youngdahl, appellant insisted on his co-defendant's presence as a prerequisite to his going to trial. The court continued the case solely to accommodate appellant. He cannot now contend that the court was in error.

Then, after the co-defendant was arrested, appellant suddenly changed his tune. Before Judge Matthews on September 27 the co-defendant's counsel, who had just been appointed on September 24, asked for a short continuance to enable him to prepare his case. Appellant, although he himself had requested and obtained a continuance of three and one-half months to suit his own purposes, objected to a continuance of a mere three weeks for the benefit of his co-defendant (Tr. 181, 212). Over appellant's objection the court granted the request, which after all had a perfectly legitimate basis.⁹ The remaining continuance of three and one-half weeks resulted from unavoidable congestion of the trial calendar. Such a short delay, particularly for this reason, does not amount to a denial of appellant's right to a speedy trial. *King v. United States*, 105 U.S. App. D.C. 193, 265 F.2d 567, *cert. denied*, 359 U.S. 998 (1959).

The right of an accused to a speedy trial is not an absolute right. It is "necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of

⁹ If appellant was so eager then to go to trial, he could have at least moved for a severance. The record reveals that appellant made no motion for a severance at any time.

public justice." *Beavers v. Haubert*, 198 U.S. 77, 87 (1905). Each case in which the speedy trial issue is raised must be decided on its own facts. "Delay and its effect, in short, will be tested by circumstances. . . . [T]he authorities demonstrate that the balance between the rights of public justice and those of the accused has been upset against the Government only where the delay has been arbitrary, purposeful, oppressive or vexatious." *Smith v. United States*, — U.S. App. D.C. —, — F.2d — (No. 17106, decided February 20, 1964), slip opinion at 6-7 (footnotes omitted). Generally speaking, a delay in prosecuting an accused violates the Sixth Amendment only if it is "purposeful or oppressive." *Pol-lard v. United States*, 352 U.S. 354, 361 (1957). If the delay is reasonable under all the circumstances, it does not give rise to any denial of the right of the accused to a speedy trial. *Smith v. United States*, *supra*; *Mattoon v. Rhay*, *supra* at 685; *Davidson v. United States*, 312 F.2d 163 (8th Cir. 1963); *United States v. Kaufman*, 311 F.2d 695 (2d Cir. 1963). Appellant's contentions do not meet the test of circumstances; indeed, appellee submits, they border on the frivolous.¹⁰

A motion to dismiss an indictment for lack of a speedy trial is addressed to the sound discretion of the trial court. Absent a showing of abuse of that discretion, the

¹⁰ Even assuming *arguendo* that the entire five months' delay could be attributed entirely to the Government, appellant has made no showing that he was in any way injured as a result. Although an affirmative showing of prejudice may perhaps be unnecessary when an accused maintains that he has been denied his Sixth Amendment right to a speedy trial (see *United States v. Lustman*, 258 F.2d 475 (2d Cir.), *cert. denied*, 358 U.S. 880 (1958)), at least there must be some prejudice apparent on the face of the record before the courts will recognize a constitutional violation. At trial appellant raised a rather bizarre defense, the details of which are beyond the scope of this argument. (It may be noted in passing that the jury evidently had little difficulty in rejecting it, for they deliberated only an hour and a half after a trial which lasted almost five days.) There is nothing to indicate that appellant's defense might have been more successful if he had gone to trial at an earlier date.

court's ruling on the motion, whether it be to grant it or to deny it, is not reviewable on appeal. *United States v. McWilliams*, 82 U.S. App. D.C. 259, 163 F.2d 695 (1947); *United States v. Research Foundation, Inc.*, 155 F. Supp. 650 (S.D.N.Y. 1957); see *United States v. Tane*, 329 F.2d 848 (2d Cir. 1964). Appellant has made no showing of any abuse of discretion, and none is apparent on the record. Quite the contrary: the trial court exercised its discretion in appellant's favor, and of this he cannot now be heard to complain. Appellee submits that the court's denial of appellant's motion to dismiss, when "tested by circumstances," turns out to be manifestly and demonstrably correct.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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APPENDIX

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CONTINUANCES IN CRIMINAL CASE No. 446-63, *United States v. Richard H. Ward*

Dates of continuance	Duration of continuance	Requested by or attributable to	Reason for continuance
June 26 (original trial date)—October 9	Three and one-half months	Appellant	Absence of co-defendant
October 9-October 30	Three weeks	Co-defendant Young	To permit more time for preparation of case
October 30-November 25	Three and one-half weeks	Congestion of Court Calendar	Criminal courts in trial; case not reached
November 25-December 2	One week	_____	Death of President Kennedy

13

